

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of

Closed Captioning and Video Description
of Video Programming

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MM Docket No. 95-176

To: The Commission

**COMMENTS OF THE A&E TELEVISION NETWORKS,
THE HISTORY CHANNEL AND OVATION**

**A&E TELEVISION NETWORKS,
THE HISTORY CHANNEL AND
OVATION**

Robert Corn-Revere
Jacqueline P. Cleary

HOGAN & HARTSON L.L.P.
555 13th Street, N.W.
Washington, DC 20004-1109
202/637-5600

Their Attorneys

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Summary of the Comments

In previous policies that affect programming networks, the Commission has recognized the need to implement a balanced approach that sought to maximize the viability of network operations. This has been true with respect to implementation of rate regulations, leased access requirements and other FCC policies. The same regulatory philosophy should be applied in this proceeding.

Although Section 713(a) directs the Commission to adopt an implementation schedule for closed captioning, both the statutory text and the legislative history direct the FCC to give due regard to the impact of such obligations on programming networks. Section 713 expressly codifies the Commission's historic approach that recognizes the economic concerns affecting different programming services. Thus, while Sections 713 (b) and (c) empower the Commission to establish rules for such captioning to be included in video programming, and to implement an "appropriate schedule" for compliance, subsection (d) establishes a series of exemptions. In particular, Section 713(d)(1) calls upon the Commission "by regulation" to exempt from any captioning schedule "programs, classes of programs, or services" for which "closed captioning would be economically burdensome to the provider or owner of such programming." Section 713(e) also requires the FCC to grant exemptions in cases of individual "hardship," where implementation would result in "significant difficulty or expense."

Given the overall public interest mandate, and the balance of factors established in Section 713, Programmers A&E and Ovation propose the following policies:

- **Captioning Requirements Should Not Involve the Commission in Micromanagement of Programming Practices.**
 - The rules should not dictate what types of programming needs to be captioned by when and should not designate certain types of programs (e.g., live local news or public affairs programming) for earlier implementation.
 - The rules should not require reformatting when a network edits a program that previously included captions.
 - The rules should not establish technical standards.
 - The rules should employ an informal complaint process.
- **Captioning Requirements Should Be Consistent With The Commission's Historic Grant of Jurisdiction.**
 - Responsibility for compliance should rest with the cable operator or other licensed video program distributor.
 - The rules should allow an MVPD to certify compliance with the schedule where the programming services it carries have certified to it that they have captioned the requisite amount of non-exempt programming.
 - In addition to channel by channel certifications, the rules should give MVPDs credit for overall efforts directed toward meeting the captioning schedule.
 - The rules should measure compliance with captioning requirements on an annualized basis.
- **The Timetable for Implementing Captioning Requirements Should Realistically Balance Competing Public Interest Needs.**
 - The rules should provide for at least a 10-year initial implementation period.
 - The rules should not establish a rigid initial compliance milestone. After three years, the Commission should conduct an inquiry followed by a report to ensure that the industry is on track toward compliance.
 - The Commission should consider modifying its compliance timetable to account for the practical reality that initial implementation will be more difficult. The

requirement could be 40 percent after five years, 65 percent after seven years and 100 percent after ten years.

- The rules should not establish a timetable for captioning of library programming.
- **The Commission Should Adopt Exemptions From The Captioning Requirements That Take Into Account the Particular Economic Situations of the Affected Industries.**
 - The rules should exempt any new network from captioning requirements until five years after launch.
 - The rules should exempt some specific programming types, such as artistic performances, musical programs and certain programming components, such as “wrap-arounds.”
 - The rules should exempt all existing programming contracts that do not affirmatively provide for closed captions.
 - The rules should implement individual “hardship” exemptions under Section 713(e) so that such relief will be available when necessary.
 - The rules regarding “undue burdens” should take into account the continuing availability, or lack thereof, of government financial support for closed captioning.

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COMMENTS OF THE A&E TELEVISION NETWORKS AND OVATION

A&E Television Networks (including the A&E Network and The History Channel) and Ovation (together, the "Programmers"), through their attorneys and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submit comments in response to the *Notice of Proposed Rulemaking* 1/ in the above-captioned proceeding (the "*Notice*").

The Commission's *Notice* and the Telecommunications Act of 1996 ("Telecom Act"), Pub.L. 104-104, 110 Stat. 56 § 305 (1996) recognize the importance of closed captioning as the number of hearing-impaired viewers has expanded. 2/ At the same time, the Commission's prior experience with captioning and other

1/ *Closed Captioning and Video Description of Video Programming, Notice of Proposed Rulemaking*, FCC 97-4 (released Jan. 17, 1997).

2/ Section 305 of the Telecommunications Act was codified as Section 713 of the Communications Act of 1934, as amended. 47 U.S.C. § 713.

programming requirements, as well as the legislative history of Section 713, suggest that the Commission must balance the goal of maximized access with the potential consequences of captioning requirements on network operations and the ability of cable networks to produce original programming. Consequently, Programmers urge the Commission to adopt flexible rules and realistic timetables that maximize programmer discretion in attaining these statutory goals.

A&E Television Networks is a cable programmer that is neither owned nor controlled by any cable operator. It offers both the A&E Network ("A&E"), an established cable network, and a newly-launched service, The History Channel. A&E is currently delivered to more than 65 million cable households throughout the country via cable, TVRO, MMDS, DBS, and SMATV distribution systems. It features critically acclaimed original entertainment programming, including the series BIOGRAPHY®, mysteries, dramatic programs and specials. Over 80 percent of A&E's prime time schedule consists of original productions. The high quality, original programming offered on this network has earned A&E more CableAce Awards than any other basic cable network. In addition, *A&E Classroom* was cited by Vice President Al Gore for its innovative, and educational role in supporting Cable in the Classroom. 3/

Given the success of A&E and the extraordinary interest expressed by television viewers for a network devoted to historical subjects, 4/ the Company

3/ *Remarks of Vice President Al Gore, National Cable Television Association Convention, Los Angeles, California, April 29, 1996.*

4/ Out of the non-cable subscribers who are most likely to subscribe to cable, the highest number (47 percent) indicated an interest in The History Channel, according to an independent 1994 Beta Research Cable Non-Subscriber Study.

launched The History Channel on January 1, 1995. The History Channel is a unique, high-quality programming service featuring historical documentaries, movies and miniseries placed in historical perspective. Despite the recency of its launch, History has over 29 million subscribers. The History Channel leads all newer networks in interest (75%), and high interest (56%). ^{5/}

Ovation, an arts cable network, was launched on April 21, 1996 to an estimated 400,000 households. Today, Ovation serves approximately 1.5 million households. By the end of 1997, Ovation is expected to reach 6 million households. The network gives viewers unprecedented access to performances of jazz, classical music, ballet, modern dance, opera, and drama; architectural landmarks and important exhibitions; and the inspired vision of artists, musicians and writers. Showcasing the finest in the visual and performing arts from across the country and around the world, Ovation features performance and documentary style programming, including occasional live telecasts of operas, dramas and musical performances.

Ovation was created in response to the large and growing national audience for the arts and the increasing public demand for quality television programming. According to a U.S. government study, 71% of all U.S. adults are interested in increased arts participation. ^{6/} Arts-oriented programming serves the public interest, as demonstrated by the fact that 41% of all adults attended an arts

^{5/} 1995 Beta Subscriber Survey.

^{6/} *Arts Participation in America*, survey conducted for the National Endowment for the Arts by the U.S. Census Bureau, 1992.

exhibition or performance in 1992, compared to only 37% who attended sporting events during the same period. 71 The network's mission is to meet the needs of the many viewers who expect more from television by providing programming that will enrich and educate with outstanding arts programming not available anywhere else.

I. THE COMMISSION MUST BALANCE CAPTIONING REQUIREMENTS OF THE TELECOMMUNICATIONS ACT WITH OTHER PUBLIC INTEREST GOALS

In previous policies that affect programming networks, the Commission has recognized the need to implement a balanced approach that sought to maximize the viability of network operations. This has been true with respect to implementation of rate regulations, leased access requirements and other FCC policies. The same regulatory philosophy should be applied in this proceeding.

A. The Commission Has Historically Applied a Balanced Analysis to Programming Policies

When the FCC initially adopted rate regulations pursuant to the 1992 Cable Act, it failed to incorporate provisions that would encourage operators to add new channels to their systems. In fact, under the FCC's initial rate regulations, the only vehicle for operators to recover costs of adding new channels was the unwieldy cost-of-service methodology, which was unavailable to many operators because of the structure of the cost-of-service rules. The rules had created an artificial bottleneck that was stalling new launches and stifling existing services. When the Commission became aware of this problem, it took remedial action.

71 *Id.*

Specifically, the FCC developed “going-forward” rules to provide incentives for cable operators to add channels to their systems. Citing its concern that then-current rules “may not provide sufficient incentives for systems with more than 12 current channels to add new channels,” the FCC revised its rules “[b]ecause appropriate incentives for adding new channels serves the statutory goal of ‘promot[ing] the availability to the public of a diversity of views and information.’” ^{8/} The revised “going-forward” rules were designed to “benefit consumers by assuring that operators will have incentives to add new services” ^{9/}

Also as part of the “going forward” rules, the Commission created “new product tiers” (“NPTs”), tiers consisting exclusively of new services (and duplicative services already carried on other tiers). NPTs were designed to “provide additional incentives for operators to provide new services to consumers because operators will be permitted to price these tiers as they choose.” ^{10/} When the FCC created NPTs, it acknowledged the shortage of channel capacity for new services. According to the FCC, the NPTs would “create additional capacity for new services on CPSTs. This capacity should help create opportunities for programmers to establish an audience for their new channels.” ^{11/} The FCC also adopted special rate regulations for small operators to encourage the addition of channels. Specifically, small system operators

^{8/} *Rate Regulation, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, 10 FCC Rcd 1226 at ¶ 8 (1995).

^{9/} *Id.* at ¶ 64.

^{10/} *Id.* at ¶ 22.

^{11/} *Id.* at ¶ 32.

were permitted to use a streamlined cost-of-service methodology to justify rate increases based on channel additions. 12/

In addition to modifying the "going forward" rules to coincide with the goal of promoting diversity, the FCC issued a number of declaratory rulings and waivers crafted to facilitate launches of new services. For example, the FCC waived the rules to permit cable operators to pass through immediately the launch costs for one new service where the rules would have otherwise required a waiting period before those costs could have been recovered by cable operators. 13/

In another move to relieve some of the tension between programmers seeking to be added to cable systems and cable operators that were constrained by rate regulation, the FCC developed the concept of flexible "social contracts." The FCC has entered into social contracts with a number of cable operators for the purpose of resolving rate complaints. Although the social contracts generally cap rates that may be charged by operators for all tiers of service, many of the social contracts provide for the creation of "migrated product tiers." 14/ The FCC created NPTs and MPTs "to

12/ *Id.* at ¶¶ 87-94.

13/ *Letter to Robert Corn-Revere from Alexandra M. Wilson* dated April 19, 1994. In another ruling, the FCC determined that marketing expenses for which cable operators were reimbursed by a programmer did not have to be offset against increases in programming costs for calculation of external cost pass-throughs. *Letter to Frederick Kuperberg from Kathleen M. H. Wallman*, 9 FCC Rcd 7762 (CSB 1994). The FCC also relaxed notice requirements to facilitate new launches. See, e.g., *Letter to Michael Ruger from Meredith J. Jones*, 10 FCC Rcd 3207 (CSB 1995).

14/ See, e.g., *Cox Communications, Inc. Social Contract*, FCC 95-483 at ¶ 35 (Dec. 1, 1995).

expand the programming choices available for subscribers.” ^{15/} The FCC was willing to offer operators the flexibility to combine established anchor programmers with new programmers to create a more attractive package, and to apply a relaxed level of rate regulation to these packages, again demonstrating a commitment to fostering diversity on the part of the FCC.

The “social contracts” that resolved rate regulation disputes provide a further example of meeting statutory objectives by not imposing regulatory mandates. The Commission concluded that it “may conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice. . . .” ^{16/} The Commission found that its goals to “simplify” regulation and “afford adequate protection for subscribers [and others]” were served by a flexible approach, rather than by strict application of the rules. ^{17/}

More recently, the Commission implemented the same type of balancing in implementing new rules for leased access channels. The Commission had proposed to use a cost/market-based approach to establish maximum permitted rates for leased access channels. ^{18/} However, the Commission ultimately opted to base leased

^{15/} *Id.* Migrated product tiers permit operators more flexibility than “new product tiers” because programming services may be moved from a regulated tier to a migrated product tier. New product tiers, on the other hand, consist only of new services and services carried duplicatively from other tiers.

^{16/} *Comcast Cable Communications, Inc., Final Resolution of Cable Programming Service Rate Complaints, Order*, FCC 95-482 (Dec. 1, 1995), citing Communications Act § 4(j), 47 U.S.C. § 154(j).

^{17/} *Id.* at ¶ 13.

^{18/} *Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-122, ¶ 49 (March 29, 1996).

access rates on the average implicit fee for similar channels. 19/ In its decision to reject the cost/market-based rate setting methodology, the Commission cited both its desire to promote the “growth and continued development of cable systems,” *id.* at ¶ 29, and its desire to avoid “requiring the operator to bump existing programming.” *Id.* This recent regulatory action exemplifies the type of flexible rulemaking that takes into account economic realities. Because the economic burdens of closed captioning can have a significant adverse impact on the overall availability of programming if the rules are implemented without considering the broader aspects of the public interest in programming, the Commission should be particularly sensitive to marketplace realities when adopting closed captioning rules and establishing benchmarks.

B. Section 713 Codifies a Balanced Public Interest Mandate

Although Section 713(a) directs the Commission to adopt an implementation schedule for closed captioning, both the statutory text and the legislative history direct the FCC to give due regard to the impact of such obligations on programming networks. 20/ Section 713 expressly codifies the Commission’s historic approach that recognizes the economic concerns affecting different programming services. Thus, while Sections 713 (b) and (c) empower the Commission to establish rules for such captioning to be included in video programming, and to implement an “appropriate schedule” for compliance, subsection (d) establishes a

19/ *Second Report and Order and Second Order on Reconsideration of the First Report and Order*, FCC 97-27, ¶¶ 30-31 (Feb. 4, 1997).

20/ Telecom Act §§ 305(a),(c)

series of exemptions. In particular, Section 713(d)(1) calls upon the Commission “by regulation” to exempt from any captioning schedule “programs, classes of programs, or services” for which “closed captioning would be economically burdensome to the provider or owner of such programming.”

The legislative history of Section 713 emphasized repeatedly the need to balance the benefits of increased accessibility against economic realities. The Conference Report recognized “that the cost to caption certain programming may be prohibitive given the market demand for such programs and other factors,” and went on to note that “the Committee does not intend that the requirement for captioning should result in . . . previously produced programming not being aired due to the cost of the captions.” 21/ The Conference Report also recognized this tension by directing the Commission to “balance the need for closed captioned programming against the potential for hindering the production and distribution of programming.” 22/ Based on this congressional balancing of public interest factors, the Commission should adopt rules and timetables designed to move program distributors toward “full accessibility” at a pace that necessarily takes into account marketplace realities. In implementing Section 713, the Commission should bear in mind that its ultimate goal is not just to

21/ H.R. REP. No. 204, 104th Cong., 1st Sess. (1995).

22/ Telecom Act, Joint Explanatory Statement of the Committee of Conference at 183.

make a greater quantity of captioning available, but also to increase the accessibility of quality, diverse video programming. 23/

C. The Commission's Rules Should Take Into Account the Practical and Economic Consequences of Captioning Requirements on Cable Networks.

Through its initial Notice of Inquiry and Report to Congress in this proceeding, the Commission developed a comprehensive understanding of the development and evolution of existing captioning services. In many respects, the data presents a heartening picture: Virtually all nationally broadcast programming, both commercial and noncommercial, contains closed captioning, including prime time programming, children's programs, news, daytime programming and some sports programming. *Notice* at ¶¶ 13-17. For a variety of good reasons, the established broadcast networks caption the vast majority of their programming, while other mass media, which developed later on, have just begun to provide captioning more frequently.

Progress in providing closed captioning did not happen overnight. The Commission first indicated a need to devote more attention to this issue twenty-seven years ago, 24/ and much existing captioning became available as a result of

23/ In a related context, the Supreme Court has observed that the Commission's public interest view of captioning requirements should be tempered by the fact that some program providers may air programs "that lack the mass appeal required for broadcast on network affiliates." *Gottfried*, 459 U.S. at 512 n.19. The Court in that case was referring to public broadcast stations, but the public interest principles at issue also apply here.

24/ See *The Use of Telecasts to Inform and Alert Viewers With Impaired Hearing*, 26 FCC 2d 917 (1970).

government support. The Commission noted that 40 percent of the cost of closed captioning was underwritten by Department of Education Grants, a source of funding that may not exist in perpetuity. ^{25/} The question of financial support is a critical one with respect to setting timetables, since the Commission has documented the high cost of closed captioning. For example, the annual cost for a local television station to caption three weekly hours of live programming was estimated to range between \$131,000 at the extreme low end, and over \$1.3 million as an upper estimate. *Notice at* ¶ 115.

As this example suggests, the rules adopted in this proceeding can have a significant impact on network programming budgets. But this point must be considered in light of the particular circumstances that relate to cable television networks. First, compared to the Commission's example, the cost of captioning requirements for cable programmers such as A&E and Ovation will be much higher, both because more programming will be subject to the mandate and because live programming costs far less to caption. The Commission's estimate that the cost of captioning falls in a range between \$800 and \$2,500 per hour is accurate, *Notice at* ¶ 18, although programmers' experience has been that actual costs are closer to the higher end of the scale. ^{26/} Rates for live captioning are about half this cost, ranging

^{25/} *Notice at* ¶ 10. The Commission recognized that the continuing availability of such funding "may affect the amount of closed captioning that can be provided." *Id.* at ¶ 46.

^{26/} The initial captioning of a show costs approximately \$1,600 per hour, plus approximately \$300 per hour in encoding costs. Reformatting a previously captioned product runs from \$350-\$450 per hour, plus encoding, which varies depending on the editing done to the original program.

from \$900 to \$1,200 per hour. However, A&E airs few live programs -- and The History Channel has aired none so far -- so neither of these services benefits from the lower cost of captioning live programming. Ovation also airs little live programming. Ovation faces the additional hurdle that much of its arts-related programming is produced in Europe, where there are no captioning requirements. 27/ As this data suggests, even a moderate timetable for compliance will impose costs on these networks of several million dollars per year.

Such an economic burden carries important implications in absolute terms on such issues as budgets for original programming. Millions of dollars devoted to captioning existing programming is millions of dollars denied to creating new programs. But then the Commission must also consider the impact in relative terms, in the context of the particular programming market at issue. Whereas the costs of captioning may be the same regardless of whether the program appears on a broadcast network or a cable network, the relative burden to the program provider will be quite different. For example, the significant differences in scale and resources between broadcast and cable networks call for the Commission to adopt rules that take these differences into account.

The economics driving the cable industry differ significantly from those of broadcast network television. Cable networks could not survive on advertising revenue alone, but must depend on support from their affiliates. The ratings achieved by cable

27/ Thus, there is little prospect that this programming will be available in captioned format in the future. Instead, the entire burden of captioning will fall on Ovation.

networks such as A&E -- which averaged a 1.26 prime-time rating in 1996 -- are on an entirely different scale from broadcast networks. 28/ Cable networks simply cannot support the same overhead costs as an established broadcast network, which has a standard average rating of around 12. 29/ This difference is crucial, since a single ratings point may be worth \$100 million in advertising revenue to a broadcast network over the course of a season. 30/ Fairness, as well as the mandate of Section 713, demands that captioning costs should not be considered in the abstract, but assessed in relation to the audience served.

The differences in scale between broadcast and cable networks are also evident in overall programming budgets. For example, the cost per prime time hour for a broadcast network is approximately \$1 million. This means that the four established over-the-air networks spend approximately \$64 million on prime time programming each week. 31/ In addition, prime time programming license fees for the networks are high and are increasing. In the 1994-95 television season, for example, the network programming cost per rating point were as follows: ABC (\$49,410); CBS (\$53,500); NBC (\$48,682); and Fox (\$68,740). The average program cost per ratings point for the networks was \$54,377 -- a 13.9 percent increase over the previous year. 32/

28/ *USA Makes It Six in Row*, Broadcasting & Cable, Jan. 1, 1996, at p.39.

29/ *People's Choice: Ratings According to Nielsen, Feb. 5-11*, Broadcasting & Cable, Feb. 19, 1996, at p.24

30/ *In the Matter of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3182 (Sikes, C., dissenting) (1991).

31/ Paul Kagan Assoc., *TV Program Stats* (Issue #73, September 30, 1994).

32/ Paul Kagan Assoc., *TV Program Stats* (Issue #83, July 27, 1995).

These figures demonstrate that the network broadcasting business is based on an entirely different scale and economic structure than applies to a cable programming network. The four broadcast networks, for example, spend more on prime time programming in two weeks than does a cable network the size of A&E, The History Channel or Ovation in the course of a year. Moreover, such costs are covered by much greater revenues, because of the differences in ratings and advertising rates. Accordingly, the economic effect of captioning requirements would be very different for a cable network than for a broadcast network.

Another factor that the FCC should take into account is the effect of captioning requirements on newly launched networks. 33/ Even successful new networks that benefit from good name recognition and other advantages take almost five years to break even after launch. 34/ Such long lead times before costs are recovered are understandable, given the high cost of launching a network. The start-up costs of launching a stand-alone cable network have been estimated at \$100 million. 35/

33/ The FCC has acknowledged the special needs of new networks in crafting rules under the Cable Act of 1992. For example, the going-forward rules were modified specifically to ease the burden on establishing new networks. *In the Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd. 1226 ¶ 22 (1994) (the "going-forward rules") ("We are concerned, based on the comments filed by operators and programmers, that our current rules may not provide sufficient incentives for operators to expand capacity and provide new services to consumers.").

34/ See *Programming Points*, Cable TV Programming, February 27, 1995 at 3.

35/ Of the cable network CEOs who are in the process of launching a new network, most anticipate that the break-even investment point is around \$90 million or \$100 million. *New Networks Square Off*, Multichannel News, Nov. 10, 1995, at p4.

The text and legislative history of the Telecom Act make clear that the Commission must take these factors into account in making any necessary rules. Cable television is just beginning to emerge as a significant producer of original programming. However, given the different economic structure as compared to broadcast networks, captioning requirements could have a disproportionately negative effect on cable networks if rules are not sensitive to these differences.

III. RECOMMENDATIONS FOR IMPLEMENTATION OF SECTION 713

The Commission's *Notice* on Closed Captioning requirements for the most part acknowledges the important balance of public interest factors embedded in the statute, recognizing that programming service could be damaged if rules are too restrictive. For example, the Commission noted that it is not practical to mandate immediate captioning of all non-exempt programming, and proposed a timetable for phasing in the obligation. *Notice* at ¶ 40. Additionally, citing House Report language that requirements for library programming would be "unrealistic" because of "economic or logistical difficulties," the Commission concluded that such requirements would reduce the amount and variety of programming options available to all viewers. *Id.* at ¶¶ 57-58, quoting House Report at 114. The Commission added that rules should not limit the availability of previously produced programming "due to the costs" involved. *Id.* Similarly, the *Notice* suggests that standards for non-technical quality issues should not be imposed, recognizing that such rules would be burdensome and difficult to administer. *Id.* at ¶¶ 113-117. The *Notice* also indicated that enforcement should be based on informal complaint processes, to the extent possible. *Id.* at ¶ 123.

Each of these conclusions is grounded in the understanding that closed captioning is not the Commission's only mandate, and that the general public interest requirements of the Act, as well as the express economic factors that are part of Section 713, require the FCC to implement a balanced approach. With such considerations in mind, Programmers make the following suggestions with respect to rules for closed captioning:

A. Captioning Requirements Should Not Involve the Commission in Micromanagement of Programming Practices.

Much of what the Commission concluded in the *Notice* can be distilled into a "no micromanagement" rule. Generally, Programmers agree with the Commission that the rules should not dictate "precisely what types of programming needs to be captioned by when." *Id.* at ¶ 42. The FCC should not designate certain types of programs (e.g., live local news or public affairs programming) for earlier implementation due to the difficulty of implementing such requirements, and because the Commission acknowledged that such broadcast programming already is largely captioned. *Id.* at ¶¶ 13-17. Additionally, the Commission should not require reformatting when a network edits a program that previously included captions, so long as the timetable is otherwise being met. *Id.* at ¶ 47. Requiring such reformatting would be burdensome, and would conflict with the Commission's overall determination that program providers should have "significant discretion regarding what will be captioned to meet the requirements and how to use the funding available for captioning." *Id.* at ¶ 42. As noted above, Programmers also agree with the Commission's tentative

conclusions not to establish technical standards and to employ an informal complaint process.

Despite these sound conclusions, some aspects of the *Notice* threaten to violate the “no micromanagement” principle. The Commission should resist the temptation to over-regulate, or even to seek comment on issues where, for good reason, it has already found that imposing requirements would be inconsistent with the public interest. For example, after concluding that Congress did not intend to impose requirements for library programming because of the cost and practical problems involved, and that such requirements would limit the availability of such programming for all viewers, the Commission nevertheless sought comments for possible “phase-in schedules” and “time frames for the transition periods.” *Id.* at ¶ 61. Such a request is unnecessary in light of the earlier conclusions.

Similarly, the Commission’s request for comments on captioning various types of musical performances, *id.* at ¶ 82, raises the threat of micromanagement, and suggests that rules could be implemented that would be particularly threatening to a service such as Ovation, that is largely devoted to the arts and to performance. As the Commission noted earlier in the *Notice*, PBS has long provided closed captioning voluntarily and provides exemplary service to its viewers, but that artistic performances and concerts on PBS generally are not captioned. *Id.* at ¶ 12. This history should give the Commission pause before attempting to fashion rules that would impose captioning requirements on some types of performances, but not others, or on some types of

music. The FCC should avoid this trap by exempting “performance-oriented” programming as a class.

B. Captioning Requirements Should Be Consistent With The Commission’s Historic Grant of Jurisdiction.

Programmers agree with the Commission’s tentative conclusion that the responsibility for compliance should rest with the cable operator or other licensed video program distributor. *Notice* at ¶ 28. The Commission has never exercised direct regulatory jurisdiction in the past over networks that are not also licensed to use the spectrum, or over producers of video programming. On the other hand, there is some precedent for obligations imposed on cable operators or other entities by the Communications Act or FCC rules that, as a practical matter, result in compliance by cable networks. *E.g.*, 47 U.S.C. § 315(b), (c)(2). The Commission noted the practical effect that rules might have, *Notice* at ¶ 30, and also expressed some uncertainty whether Congress intended to vest the FCC “with jurisdiction over other parties in the production and distribution chain.” *Id.* at ¶ 29. Given these considerations, the Commission should exercise its jurisdiction in a way that maximizes certainty and that does not seek to over-extend its authority. The Commission’s tentative conclusion in this regard is sound.

To the extent the obligation to comply with the rules falls upon cable operators or other MVPDs, the Commission should develop a method of compliance that is both administratively manageable and does not tend toward micromanagement. Toward this end, the Commission should allow an MVPD to certify compliance with the schedule established by these rules to the extent the programming services it carries

have certified to it that they have captioned the requisite amount of non-exempt programming. 36/ Any MVPD that has received such assurances would be in good faith compliance with the rules.

The Commission should also build some flexibility into its enforcement of the rules in recognition that the new statutory requirements do not exist in a vacuum, but instead build upon almost three decades of development in this field. Thus, while it is administratively necessary to measure compliance channel by channel as a general matter, MVPDs should receive some credit for the years voluntary initiatives, bolstered by government funding, that produced a large amount of captioned material in advance of the new timetable. For example, if a complaint is filed against any MVPD and any particular network's efforts fell short of the requirements, no penalty should be assessed if the MVPD's overall efforts showed that it is on track toward meeting the FCC's schedule. The *Notice*, for example, indicated that "a cable system could meet its obligation solely by passing through the captioned programs of the broadcast stations it carries." *Id.* at ¶ 43.

Compliance with captioning requirements should be measured on an annualized basis, rather than weekly, monthly, or some other period. *Id.* at ¶ 45. To

36/ Network certifications could be kept in MVPD's public files. Certifications could identify the number of non-exempt hours of programming that are carried on that network, and list the number of hours that have been captioned. Since programming networks anticipate that their compliance obligations will be imposed by contractual provisions, the FCC should prohibit contracts that would impose discriminatory obligations on unaffiliated networks. The rules should not permit MVPDs to enforce contracts that would require an unaffiliated network to shoulder any greater burden of compliance than is imposed on any network with which the operator is affiliated.

the extent the Commission is seeking to implement a “rational, market-driven allocation of captioning resources,” *id.* at ¶ 43, it should recognize that networks do not place orders for programming on a weekly or monthly basis. Programs are ordered for season-length runs or longer. Measuring compliance in shorter increments would fail to take this fact into account. Otherwise, the rules will not present a realistic picture of the programming market and will suffer from micromanagement.

This proposal is designed to reconcile various concerns: (1) It would be administratively feasible, both from the perspective of those who must enforce the law and those who must comply with it; (2) It recognizes that MVPDs carry many networks, that MVPDs should not be penalized if a particular network or networks fall short of overall timetables, and that compliance should take into account overall efforts; and (3) It does not involve the Commission in an unwarranted expansion of jurisdiction beyond its traditional mandates.

C. The Timetable for Implementing Captioning Requirements Should Realistically Balance Competing Public Interest Needs.

The Act and the Commission’s Notice both indicate that the timetable for compliance must be realistic in light of the marketplace and existing obligations. The current amount of captioning transmitted by broadcasting networks developed over a far longer period, was implemented generally by entities with far greater resources operating in a very different market, and was supported to a large degree by government assistance. Given this context, implementing captions under the current Act in an 8 to 10 year period is a relatively short time frame. This history, as well as congressional direction, indicate that the FCC should impose a longer, rather than